In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-1189

RONALD W. JOHNSON AND TERRY EUGENE CUSHENBERY, PETITIONERS

v.

JOHN W. WARNER, SECRETARY OF THE NAVY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

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1. Petitioners, Navy enlisted men, brought separate actions in the district court seeking writs of habeas corpus to test the legality of agreements they executed in 1967 and 1968 extending their service obligations for two years in return for their receiving advanced training in the nuclear field program.[1] The agreements were signed for the Navy by a noncommissioned warrant officer, who also notarized the petitioners' signatures and administered oaths of allegiance (Johnson Rec. 7, Cushenbery Rec. 6). At the time only commissioned officers were spec-

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[1]Military extension agreements are authorized under 10 U.S.C. 509, previously 10 U.S.C. (1964 ed.) 5539(a).

The relevant Bureau of Naval Personnel Instruction (No. 1306.64E) required that personnel entering the nuclear field program agree to extend their enlistments so that they would have a minimum of six years active obligated service from date of enlistment (Pet. App. 1, n. 1).

ifically authorized by statute and by Navy directives to sign such agreements and administer oaths (Pet. App. 2, n. 2). See generally 10 U.S.C. 502, 936(b)(6), 1031; Bureau of Naval Personnel Manual (BUPERSMAN) Arts. B-2305(4), C-1407(1)(b), C-1407(3)(a), now Arts. 5030230 (3)(a), 1050150(1)(b), 1050150(3)(a).

Petitioner Johnson received approximately 33 weeks of the one-year training program and was then disqualified for medical reasons (Pet. App. 11). Petitioner Cushenbery received the entire one-year training (Cushenbery Rec. 17). Petitioner Johnson is entitled under Navy directives to a pro-rated reduction of his extended service obligation as a result of his inability to complete the training program.[2]

After receiving the foregoing training and prior to the expiration of their original terms of service, both petitioners requested the Navy to cancel their extension agreements on the ground that, since the agreements had not been signed and sworn to before a commissioned officer, they were not legally binding (Johnson Rec. 2-3, Cushenbery Rec. 2). When the Navy refused to cancel the agreements, petitioners filed their actions for habeas corpus (Johnson Rec. 1-12, Cushenbery Rec. 1-7). The district court granted the writs on the ground that the Navy was bound by its own regulations (Pet. App. 10-17, 21-22).

The court of appeals reversed in *Johnson* (469 F. 2d 1216), agreeing with the Secretary that "notarization of the agreement by a noncommissioned officer was merely a 'formal defect' in the notarial authority of the witnessing officer which did not vitiate the legal effect of the

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[2]Pet. App. 7, n. 8. See BUPERSMAN Art. D-2305 (Johnson Rec. 34-35), now Art. 1050300 (Johnson Rec. 30-32). Cf. *Nixon* v. *Secretary of Navy*, 422 F. 2d 934, 940 (C.A. 2).

agreement" (Pet. App. 3). The court held that "because Johnson had clearly manifested his voluntary written intent to be bound by the extension agreement, a mere formal defect therein, which in no way prejudiced him, does not present adequate grounds to cancel an otherwise valid agreement" (Pet. App. 4). On December 4, 1972, the court of appeals reversed the district court in *Cushenbery* on the authority of *Johnson* (Pet. App. 8a-8b).[3]

The court of appeals' decision was correct. Petitioners suffered no prejudice from the "formal defect" which accompanied the extension of their enlistments, and received the benefits of the additional training in return for which they extended their service obligations. Cf. *United States ex rel. Stone* v. *Robinson*, 431 F. 2d 548, 553 (C.A. 3), where the court rejected a similar attempt by an airman to avoid the extension of his enlistment on the ground that he had not sworn to his extension application. Cf. also, *In re Grimley*, 137 U.S. 147, and *In re Morrissey*, 137 U.S. 157, where this Court rejected attempts by soldiers to avoid their enlistment contracts on the ground that at the time of enlistment they were

[3] The court of appeals also reversed the district court's similar decision in *Kubitschek* v. *Chafee*, No. 72-687—LTL (Pet. App. 18-20). See 469 F. 2d 1221.

not of the permissible age.[4] Moreover, the Navy ratified the action of the warrant officer by providing the petitioners with the training which it agreed to furnish them.

The court of appeals properly rejected petitioners' attempt on technical grounds to avoid the extension of their enlistment agreements which they voluntarily entered into in order to obtain additional training from the Navy. The petition for a writ of certiorari should be denied.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

APRIL 1973.

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[4]Petitioners' reliance on *Rehart* v. *Clark*, 448 F. 2d 170 (C.A. 9), is misplaced. There the plaintiff extended his enlistment in return for the Navy's undertaking to send him to certain schools. He contended that he was entitled to attend three schools. Navy regulations, however, permitted attendance at only one school. When the Navy refused to send him to the two additional schools, plaintiff sought to avoid the extension of his enlistment.

The district court refused to consider the Navy regulations in interpreting the contract. The court of appeals reversed and remanded the case for the district court to do so. *Rehart* thus involved only a question of contract interpretation. Moreover, under the Navy's interpretation of the contract, the plaintiff had not received the schooling for which he alleged he had extended his enlistment. In the present case, in contrast, the petitioners received what the Navy had undertaken to furnish them.